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No. 90-1280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari submitted by The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. does not provide a sufficient basis for this Court to exercise its discretionary jurisdiction. The issues raised have not been adequately explored by the lower federal courts and should be allowed to percolate, in order to permit a fuller development of these complicated issues.

In addition, a careful analysis of the decision of the Court of Appeals for the Second Circuit[1] demonstrates that it correctly held that the adversary proceeding commenced by respondent Ben Cooper, Inc. was a core proceeding and that the core proceeding should be referred to the bankruptcy court for a jury trial. The arguments cited in the petition are insufficient to require review.

REASONS FOR DENYING THE WRIT

POINT I

THE ISSUES RAISED IN THE PETITION ARE NOT YET APPROPRIATE FOR REVIEW

Since the Second Circuit rendered the decision sought to be reviewed, two other circuit courts have ruled on one of the issues raised in the petition — the authority of bankruptcy judges to conduct jury trials. Although the Eighth Circuit in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990) and the Tenth Circuit in *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990) each disagreed with the Second Circuit's holding that bankruptcy judges have the authority to conduct jury trials, only the Second Circuit analyzed both the statutory and constitutional basis for such authority. Thus, in spite of this conflict, it is submitted that the issues raised should be permitted to percolate further before this Court issues a definitive ruling.

The benefits of percolation have long been recognized as a reason for denying certiorari. As Justice Frankfurter stated

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[1] The decision of the Second Circuit is reported at 896 F.2d 1394 (2d Cir. 1990), and is reprinted in the appendix to the petition at A-12.

in *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950): "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

Professors Estreicher and Sexton, in a study of the Supreme Court's responsibilities, explained the advantages of percolation:

> ... Disagreements in the lower courts facilitate percolation — the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of these lower courts.

Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 716 (1984). *See also* Baker, *A Practical Guide to Certiorari*, 33 Cath. Univ. L. Rev. 611, 618 (1984) ("Each additional decision may shed new light on the way the issue should be analyzed. While it makes for temporary uncertainty, this process of percolation is ultimately good for the law."); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, n. at 199 (6th ed. 1986) ("In some cases the Justices may feel that the time is not ripe for the Court to resolve a conflict, preferring to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts.").

Further percolation is especially appropriate in this case. As stated previously, neither the Eighth Circuit nor the Tenth Circuit addressed the constitutional basis for the conduct of jury trials by bankruptcy judges, relying solely on their belief that bankruptcy judges lacked the statutory authority to conduct jury trials. Only the Second Circuit explored both the

statutory and constitutional basis for a bankruptcy judge's authority to conduct jury trials. Thus, the conflict among the Second, Eighth and Tenth Circuits is limited to one aspect of one of the issues presented for review (the other examples cited by petitioners are all lower court cases). This Court should permit additional percolation of this complex issue so that, when a binding national ruling is made, this Court has the benefit of more fully developed views among the circuits.[2]

With respect to the other issue sought to be reviewed — the Second Circuit's determination that the adversary proceeding is core — the other circuit-level cases relied upon in the petition are readily distinguishable and do not reflect a true conflict among the circuits. As the Second Circuit noted, the Ninth Circuit's decision in *Piombo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986) was based on a pre-petition contract claim unlike the post-petition claim in this case. Similarly, *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), though involving post-petition activities (the issuance of stock), did not involve a contract knowingly entered into with a debtor-in-possession, which was required to maintain proper insurance under its proposed plan of reorganization. Whereas the effect on administration of the estate may not have been clear in *Wood*, the effect on estate administration in the case at bar was very clear.

Contrary to petitioners' argument (p.28), the nature of the underlying dispute cannot be considered in a vacuum; the

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[2] In fact, were the Court to grant certiorari and find that the Second Circuit was incorrect on the core/noncore issue, it would not be necessary for the Court to even address the conflict among the Second, Eighth and Tenth Circuits.

effect of the dispute on administration of the estate must be considered. Moreover, the Second Circuit's finding is arguably consistent with *Wood* since, as a post-petition claim, this proceeding could not have arisen *except* in the context of a bankruptcy case.

Of course, the mere presence of a conflict among the circuits is not determinative. Although the Court usually does not state its reasons for denying certiorari, there are numerous examples of a denial of certiorari despite a conflict among circuit courts. *See, e.g., Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982); *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060 (1981); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting) (citing seven examples of cases on a particular conference calendar in which certiorari was denied despite a conflict among the circuits); *U.S. v. Mayes*, 431 U.S. 924 (1977); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975). Even during the current term, the Court has denied certiorari despite the presence of a conflict. *See Pryb v. U.S.*, 59 U.S.L.W. 3292 (Oct. 15, 1990); *Teel v. Tennessee*, 59 U.S.L.W. 3404 (Dec. 3, 1990).

Clearly, not every conflict is intolerable. In fact, Professors Estreicher and Sexton suggest that only certain conflicts are of an intolerable nature:

> For example, an intolerable conflict occurs when litigants are able to exploit conflicts affirmatively through forum shopping, or when the planning of primary behavior is thwarted by the absence of a nationally binding rule. Disuniformity in the law becomes intolerable when litigants are able to bring themselves under radically different legal regimes

> through forum choice or are unable to readily adjust their affairs to the law's divergent commands.

Estreicher & Sexton, *supra*, at 725.[3]

Here, the forum shopping and planning concerns raised by Professors Estreicher and Sexton are not present. The choice of a bankruptcy forum is usually severely limited and it is highly unlikely, despite the arguments raised by petitioners, that any entity would be hampered in its planning by disagreement among the circuits concerning the core/noncore jurisdiction of bankruptcy courts or their authority to conduct jury trials.

As Justice Stevens stated to the American Judicature Society in 1982:

> ... the existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . . It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Stevens, *Some thoughts on judicial restraint*, 66 Judicature 177, 183 (1982).

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[3] Though Professors Estreicher and Sexton believe that a tolerable conflict may become intolerable once three circuits have addressed the issue, they also agree that "(a)ppropriate percolation often requires consideration by more than three courts." *Id.*, at 727. In this case, where only one of three courts has fully explored the issue, further percolation would be beneficial.

The judicial restraint urged by Justice Stevens is particularly appropriate here.

POINT II

THE DECISION OF THE SECOND CIRCUIT WAS CORRECT AND NEED NOT BE REVIEWED

A. *The Second Circuit Correctly Held That a Bankruptcy Court Has Core Jurisdiction Over State Law Claims Involving a Post-Petition Contract*

After reviewing this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as well as the statutory framework contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), the Second Circuit held that the bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over state law contract claims when the contract was entered into post-petition. This holding is fully consistent with *Marathon* and the resulting statutory scheme.

In finding the adversary proceeding to be a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) — administration of the estate — the Second Circuit recognized the crucial difference between a dispute arising before the filing of the bankruptcy petition and a dispute arising after the filing of the petition, and determined that post-petition activities must be analyzed differently from pre-petition activities.[4]

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[4] Contrary to petitioners' statement, the Second Circuit did in fact consider the state law nature of the underlying dispute. Of course, the fact

(Footnote continued)

In the case at bar, the Second Circuit noted that the facility at which the fire took place was an asset of the estate; the debtor's plan of reorganization expressly required that the debtor maintain adequate insurance; the confirmation of the plan was premised on the maintenance of adequate insurance; and the appellees (petitioners) were fully aware that they were dealing with a debtor (A-23). Under these circumstances, the Second Circuit found that "(i)t is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." (A-23)

Contrary to petitioners' argument, there is nothing arbitrary about the test applied by the Second Circuit. A debtor-in-possession is an entity created by the bankruptcy laws. It is hardly arbitrary to hold that those who *knowingly* contract with a debtor-in-possession be held accountable before the court charged with protecting the debtor. Indeed, this is the only holding consistent with the statutory scheme.

The Second Circuit's holding is also consistent with this Court's decision in *Marathon*. The Court in *Marathon* held that Congress could grant bankruptcy courts the right to issue final orders in actions that were at the "core of the federal bankruptcy power," but not in those actions which involved merely "state-created private rights". *Id.*, 458 U.S. at 71. The dispute in *Marathon* arose pre-petition; thus, the holding in *Marathon* is entirely consistent with the holding of the Second Circuit. *See, e.g., Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 166 (1st Cir. 1987) ("In our view, the matter of timing and the relation to judicial administration of the bankrupt's estate make a critical

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that the adversary proceeding involves state law issues is, by statute, not determinative. *See* 28 U.S.C. § 157(b)(3).

constitutional difference between *Marathon* and the present case.").

A pre-petition cause of action fits more readily within the Court's description of "private" rights. However, once the bankruptcy petition is filed, post-petition contracts fit squarely within the core of the federal bankruptcy power which, in this case, concerns the administration of the estate.

In holding that a post-petition contract is an essential part of estate administration, the Court below was merely acknowledging the intent of Congress in enacting BAFJA — to ensure that proceedings "core" to the debtor's rehabilitation be determined by the bankruptcy court. This holding should not be disturbed.

B. *The Second Circuit Correctly Ruled That a Bankruptcy Court May Conduct a Jury Trial in Core Proceedings*

In ruling that a bankruptcy court may hold a jury trial in a core proceeding, the Second Circuit came to the only conclusion consistent with the statutory scheme.[5]

In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989), this Court held that Congress could not eliminate a party's Seventh Amendment right to a jury trial. *Id.*, 109 S.Ct. at 2800. However, the Court found it unnecessary to explicitly rule on the jury trial issue. *Id.*, 109

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[5] Indeed, the conduct of jury trials within bankruptcy proceedings is appropriate for sound policy reasons and is consistent with the primary goals of the federal bankruptcy system. Removing proceedings involving jury trials from the bankruptcy courts would not only bifurcate and delay the resolution of bankruptcy reorganizations but would also overwhelm an already overcrowded district court system.

S.Ct. at 2802. Despite petitioners' arguments, the fact that this Court left open the jury trial question in *Granfinanciera* does not compel the Court to answer it now.

Since *Granfinanciera* did not decide the issue, the Second Circuit examined the statutory and constitutional authority for jury trials in bankruptcy court.

Finding little guidance in the only statute which explicitly addresses jury trials (28 U.S.C. § 1411), the Court turned to the statutes granting jurisdiction to the bankruptcy court. 28 U.S.C. § 151 gives bankruptcy judges "the authority conferred under this chapter with respect to any action, suit or proceeding." 28 U.S.C. § 157(b) gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. The Second Circuit believed that the only way to reconcile these concerns, consistent with *Granfinanciera*, was to permit the bankruptcy court to conduct jury trials.

Next, the Second Circuit turned to the Constitution. The Court found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutory provisions do not require *de novo* review of determinations in core proceedings. Contrary to petitioners' statement (p.36), the Second Circuit never acknowledged a Seventh Amendment problem with respect to *core* proceedings, but only with respect to *non-core* proceedings (A-31).

As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, jury verdicts likewise would not be violative of Article III.

No further elaboration is necessary and the jury trial issue need not be reviewed.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: April 16, 1991

Respectfully submitted,

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